KAREN P. HEWITT
United States Attorney
STEVE MILLER
Assistant U.S. Attorney
California State Bar No. 138020
United States Courthouse
940 Front Street, Room 5152
San Diego, California 92189-0150
Telephone: (619) 557-5432
email: steve.miller2@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RAMON ESPERANZA CARRILLO, Defendant.	Criminal Case No. 08cr1446-WQH DATE: September 8, 2008 TIME: 9:00 a.m. GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANTS' MOTIONS IN LIMINE TO: (1) PRECLUDE 404(b) and 609 EVIDENCE; (2) PRECLUDE DEPORTATION DOCUMENTS AS EVIDENCE OF ALIENAGE; (3) COMPEL INSPECTION OF CERTIFIED DOCUMENTS PRE-TRIAL (4) PRECLUDE THE A-FILE CUSTODIAN FROM TESTIFYING ABOUT IMMIGRATION PROCEEDINGS; (5) PRECLUDE THE A-FILE CUSTODIAN FROM TESTIFYING ABOUT DATABASE SEARCHES; (6) ALLOW IMPEACHMENT OF ALL HEARSAY DECLARANTS; AND (7) LEAVE TO FILE FURTHER MOTIONS TOGETHER WITH GOVERNMENT'S MOTION FOR RECIPROCAL DISCOVERY

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Steve Miller, Assistant United States Attorney, and hereby files its response and opposition to defendants' above-referenced motions in limine. Said response is based upon the files and records of this case, together with the attached statement of facts, memorandum of points and authorities.

I

STATEMENT OF FACTS

On September 4, 1994, defendant RAMON ESPERANZA CARRILLO was convicted of bribery and of unlawfully carrying a firearm in a tavern in a Dallas, Texas court and sentenced to 3 years in prison.

On September 24, 1997, defendant was ordered deported by an immigration court. Defendant's case was not decided during a mass deportation hearing. Defendant hired an attorney to contest the deportation and entered admissions of the allegation of the OSC through his attorney. The sole issue at the hearing was whether defendant was entitled to 212(c)relief based upon the nature of his prior felony conviction. The immigration judge denied his request and issued an order with written findings. Defendant appealed the ruling to executive office for Immigration Review and the decision was affirmed on March 8, 2000. Defendant was deported.

On February 27, 2007, defendant was arrested in Nona Ana County in New Mexico and charged with 8 U.S.C. § 1326.

On February 29, 2008, defendant was convicted of 8 U.S.C. § 1326 in the District of New Mexico and was sentenced to 15 months prison. After his conviction in New Mexico, defendant was removed through El Paso Del Norte, Texas on April 1, 2008.

Nine days later, on April 10, 2008, Border Patrol agents from the Boulevard Sector in San Diego followed a set of six footprints on a trail and located defendant in the brush four miles north of the border and 25 miles east of the Tecate Port of Entry. The agents discovered defendant while he hid among a set of boulders with five other aliens. In the field, defendant admitted that he was a Mexican citizen with no legal right to be in the United States.

When the agents advised defendant of his Miranda rights, defendant invoked his right to remain silent.

II

POINTS AND AUTHORITIES

A. THE GOVERNMENT HAS ALREADY GIVEN NOTICE OF 404(B) EVIDENCE AND INTENDS TO IMPEACH WITH PRIOR FELONIES

Defendant moves to exclude evidence of other acts under Rule 404(b) and exclude evidence of defendant's prior felonies under Rule 609. As this court is aware, defendant has a prior conviction in the district of New Mexico for 8 U.S.C. § 1326. Furthermore, prior to his deportation, defendant applied for immigration status. After he was granted status to remain in the country, he was convicted of possession of a firearm and bribery. During his deportation hearing, defendant made judicial admissions of the allegations in the OSC and only contested the issue whether his conviction qualified him for a 212(c) relief.

This court ruled that defendant's admissions during his guilty plea did not qualify as 404(b) evidence. Though his prior act of applying for immigration status is inextricably intertwined with the relevant evidence in this case, to the extent that defendant argues that it is evidence under 404(b), the Government intends to offer that evidence. The Government also intends to offer his prior admissions at his deportation hearing and guilty plea to establish his alienage.

In the event defendant elects to testify, the Government intends to use the fact that he has a felony conviction to impeach his testimony. To the extent that defendant's testimony contradicts facts established by his conviction for 1326, the Government intends to examine those inconsistencies on cross-examination.

B. DEPORTATION DOCUMENTS MAY BE USED AS EVIDENCE OF ALIENAGE

Defendant moves in limine to exclude documents from the A-file as inadmissible evidence and to limit the A-file evidence on the issue of alienage. Essentially, defendant's motions in limine are attempts to skirt around the fact that: 1) defendant is an alien; 2) defendant was deported because he is an alien; and 3) the entire process for deporting individuals from the United States is designed to remove people who are other that U.S. citizen (i.e. "aliens").

Defendant argues that this court should limit the relevance of the documents related to defendant's deportation as not bearing upon defendant's alienage. It is true, under United States v. Hernandez, 105 F.3d 1330, 1333 (9th Cir. 1996), that the court held that the deportation, in and of itself, was insufficient to establish a defendant's alienage. However, subsequent precedent out of this district also held that the deportation order and defendant's statements are sufficient to establish alienage. United States v. Ramirez-Cortez, 213 F.3d 1149, 1158 (9th Cir. 2000).

In fact, the court in United States v. Parga-Rosas, 238 F.3d 1209, 1214 (9th Cir. 2001), stated:

> Proof of an Alien Registration File in his name, his application for an immigrant visa, his notice to appear at a deportation hearing and order of deportation, his warrant of deportation, a certificate of nonexistence of application for legal re-entry, together with testimony by an immigration officer that Parga-Rosas stated at his deportation hearing that he was a native and citizen of Mexico, suffices.

Therefore, defendant's motion to limit the relevance of the deportation documents should be denied because established case law authorizes the jury to consider the deportation as one of the factors in evaluating whether defendant is an alien.

Defendant also argues that evidence of an alien's deportation is insufficient to establish alienage because of the lower standard of proof. However, in this particular, there was a judicial finding that defendant was an alien beyond a reasonable doubt because he was convicted of 8 U.S.C. § 1326 in New Mexico. Though a prior conviction for 8 U.S.C. § 1325 or 1326 is not res judicata that bars a defendant from asserting U.S. citizenship, it is relevant admissible evidence that is proof of a defendant's alienage. United States v. Smith-Baltiher, 424 F.3d 913 (9th Cir. 2005), United States v. Bejar-Matrecios, 618 F.3d 81 (9th Cir. 1980).

In Bejar-Matrecios, the court held that the error in admitting the Judgment and Commitment of the appellant's prior conviction was that the court did not give a limiting instruction informing the jury that the relevance of the document was to establish alienage. Id. at 84. In the present case, the Government would offer the evidence of defendant's conviction through the certified docket and request this court give a limiting instruction. The Government would not offer the Judgment and Commitment as an exhibit if defendant stipulated to his alienage or this court was willing to take judicial notice that there was a prior judicial finding that defendant was an alien.

Absent such a stipulation or judicial notice, the Government would also seek to introduce the immigration court's judicial findings to establish alienage. Such a memorandum was found admissible in United States v. Ballesteros-Selinger, 454 F.3d 973 (9th Cir. 2007).

Therefore, defendant's motion to limit the relevancy of the deportation should be denied because the fact of his deportation, when viewed in context with other relevant evidence, becomes proof of defendant's alienage.

C. DEFENDANT'S CONSTITUTIONAL RIGHTS ARE NOT VIOLATED BY USE OF THE A-FILE DOCUMENTS

Defendant argues that the court should exclude admission of the A-file documents because the immigration court used a lower standard of proof and defendant did not have an opportunity to confront the witnesses upon whose hearsay the immigration judge based his decision. Defendant can hardly complain about the information upon which the immigration judge relied because defendant availed himself of the opportunity to contest his deportation. When defendant was facing deportation, the hearing was continued four times for defendant to be represented by counsel. At the final hearing, defendant's attorney entered admissions to all the allegation of the OSC and contested the issue whether the prior conviction disqualified him for relief under 212 (c) or (h). Therefore, defendant has no room to complain about the source of the court's information because the immigration based his finding that defendant was an alien upon information provided by defendant.

D. COUNSEL CAN INSPECT THE DOCUMENTS BEFORE TRIAL

The government has no objection to defendant's counsel reviewing the certified document. Once the documents are certified, counsel can inspect them at a mutually convenient time. The Government anticipates this to occur well before the in limine date.

//

//

//

E. THE CUSTODIAN'S EXPLANATION OF THE RELEVANT DOCUMENTS IS ADMISSIBLE

The defendant moves to preclude the A-file custodian from testifying about the documents contained in defendant's file because of a lack of personal knowledge of the events. One need not be an expert to be familiar with the significance of documents. Nor does the custodian need to have personal knowledge of the specific events that caused the documents to be generated.

The immigration documents generated by the immigration service are no different than other business records. For instance, a custodian of a bank does not need personal knowledge of every transaction to explain how checks are cashed or records of transactions are compiled. If a check had a person's signature (and sometimes fingerprint) on it, and was processed through the bank, the records of the bank are admissible to show that the person caused the check to be processed. The bank custodian does not need to have personal knowledge of the individual transaction to explain the bank's process.

The difference in the present case to the check example, is that most of the general public who serve as jurors will not be familiar with the forms used by the immigration service. Defendant's motion to preclude the custodian's testimony is really an attempt to capitalize on the general public's ignorance of immigration procedures to instill confusion in the jurors' minds. The custodian's explanation of the forms and the process related to the forms is admissible evidence that will decrease the potential juror confusion regarding an unfamiliar topic.

//

F. THE CUSTODIAN CAN TESTIFY ABOUT AN ABSENCE OF RECORD

Defendant moves this court to preclude the custodian from testifying about searching a database for records. Evidence of an absence of record is admissible under FRE § 803(7) and (10). The custodian is entitled to testify that the records of the A-file are kept in the ordinary course of business. The custodian's familiarity with how the document's are generated also entitles him to testify what documents would be generated in the event defendant had applied for permission to enter the country. In the event the documents had been generated and were en route to the A-file, the custodian is qualified to testify that he knows where to look for documents that should be tracked to the entire file. Consequently, the custodian is able to testify about searching the databases to establish an absence of record in the A-file.

G. DEFENDANT'S ABILITY TO IMPEACH A HEARSAY DECLARANT SHOULD BE LIMITED

Defendant moves this court to permit him to impeach hearsay declarants. The Government does not dispute that hearsay declarant may be impeached, but the right and ability to do so is not unlimited. In the past, the Government is aware of attempts by defendants to offer evidence of events at the central record depository in Laguna Nigel, California. One defendant sought to subpoena the Washington DC resident who signed the Certificate of Non-existence. Such attempts to impeach hearsay declarants are unduly burdensome and are designed to cause confusion rather that an legitimate attempt to offer relevant evidence. In the event that defendant's attempts to impeach the delcarants raise the specter of some speculative problem with the records, or attempt to impose an undue burden upon the delcarant, the probative value of that evidence does not out weigh the prejudicial effect and the confusion it may cause. Consequently, such attempts to impeach the declarant should be refused by this court under FRE 403.

III

CONCLUSION

For the foregoing reasons, the Government respectfully requests that defendant's motions in limine be denied and granted where unopposed.

DATED: September 2, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

S/ Steve Miller

STEVE MILLER
Assistant U.S. Attorney

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RAMON ESPERANZA CARRILLO, Defendant.	Criminal Case No. 08cr1446-WQH CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Steve Miller, am a Citizen of the United States over the age of eighteen years and a resident of San Diego county, California. My business address is 880 Front Street, San Diego, California 92101-8893. I am not a party to the above-entitled action. I have caused service of the Government's Response and Opposition to Defendant's Motions in Limine on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF system, which electronically notifies them.

1. Robert Henssler, Federal Defenders of San Diego, Inc.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-EFC participants on this case n/a the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 2, 2008

s/Steve Miller
STEVE MILLER